

FILED

DISTRICT COURT OF GUAM

DEC 27 2004

MARY L.M. MORAN
CLERK OF COURT

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UNITED STATES DISTRICT COURT OF GUAM
TERRITORY OF GUAM

TONY H. ASHTIANI

Plaintiff,

v.

CONTINENTAL MICRONESIA
INC., dba CONTINENTAL
MICRONESIA, and
CONTINENTAL AIRLINES,
INC.,

Defendants.

CV 02-00032

ORDER

Defendants Continental Micronesia, Inc.
("Continental"), d/b/a Continental Micronesia, and
Continental Airlines, Inc. (collectively "Defendants")
Motion for Attorneys' Fees came under submission before this
Court. Having considered all papers and argument submitted,
THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

ORIGINAL

1 **I. INTRODUCTION/PROCEDURAL POSTURE**

2 This case deals with the termination of Plaintiff Tony
3 Ashtiani ("Plaintiff" or "Ashtiani"), a former airplane
4 mechanic, from Continental's employ. On May 15, 2003,
5 Plaintiff filed a Second Amended Complaint ("SAC") in this
6 Court asserting eight causes of action: (1) Intentional
7 Infliction of Emotional Distress; (2) Negligent Supervision;
8 (3) Unlawful Discrimination Based Upon Race and National
9 Origin; (4) Intentional Discrimination and Intentional
10 Retaliation Post-9/11; (5) Violation of Family and Medical
11 Leave Act of 1993 ("FMLA"); (6) Constructive Termination;
12 (7) Wrongful Termination; and (8) Sales of Fraudulent
13 Insurance Policies by Defendant to Employees.

14 On November 21, 2003, Plaintiff filed a Motion for
15 Partial Summary Judgment as to six of the causes of action
16 (all but No. 5 and No. 8) and Defendants filed a Motion for
17 Summary Judgment on all eight causes of action.

18 On August 30, 2004, the Court issued an Order and
19 Judgment granting Defendants' Motion for Summary Judgment on
20 all eight causes of action against Plaintiff and denying
21 Plaintiff's Motion for Partial Summary Judgment on the six
22 causes of action.¹

23 On September 13, 2004, Defendant filed the present
24 Motion for Attorneys' Fees. Plaintiff has not filed an

25 ¹ Additionally, both parties filed numerous motions and cross-
26 motions to strike evidence, all of which the Court denied as moot.

1 Opposition to this Motion.²

2 **II. BACKGROUND**

3 Plaintiff Ashtiani was employed as an airplane mechanic
4 with Continental for seventeen years. While Ashtiani was
5 employed, Continental had in force an attendance policy.
6 Under the policy, if an employee was unable to report to
7 work as scheduled he or she was required to notify a
8 supervisor on duty prior to the start of his or her shift.

9 During his tenure with Continental, Ashtiani exhibited
10 a pattern of absenteeism, which ultimately led to his
11 dismissal. For example, Ashtiani left work early on June 2,
12 2001, because his son was ill. On June 4 and 5, 2001,
13 Ashtiani was granted "sick" time to care for his son.
14 Ashtiani was approved to take personal leave from June 10
15 through June 12, 2001.

16 On June 16, Ashtiani was approved for an additional
17 personal day. However, Ashtiani failed to report to work on
18 June 17 through June 19, 2001. These absences were not
19 approved. As such, he was subject to discipline. On June
20 19, Ashtiani spoke to one of his supervisors and although he
21 expressed an interest in taking a formal Leave of Absence,
22 he did not take further action in that regard.

23
24 ² Local Civ.R. 7.1(f) states "[p]apers not timely filed by a
25 party including any memoranda or other papers required to be filed
26 under this Rule will not be considered and such tardiness may be
deemed by the Court as consent to the granting or denial of the
motion, as the case may be."

1 On June 23 and 24, Ashtiani again failed to show up for
2 work and failed to seek approval for these absences from a
3 supervisor. On June 25, 2004, the Plaintiff reported to
4 work. On June 26, Ashtiani met with his supervisor and
5 union representative to discuss the absences on June 23 and
6 24. On June 27, Ashtiani's supervisor emailed Ashtiani
7 regarding a further meeting on July 2, and requested
8 confirmation of his attendance at the meeting. Ashtiani
9 neither confirmed the date of the meeting nor attended it.
10 Consequently, Continental fired Ashtiani on July 3, 2001.

11 Proceeding *pro se*, Ashtiani filed a Complaint under
12 Title VII on November 11, 2002. On March 10, 2003, Ashtiani
13 filed an Amended Complaint. In the early stages of this
14 case, it was clear that Plaintiff was unfamiliar with the
15 legal process. He filed a number of documents that were
16 meritless, frivolous and/or unreasonable. For example, on
17 March 31, 2003, Ashtiani filed a Motion to Seize
18 Investigation, Intimidation, Harassment & Blackmail. On
19 April 3, 2003, Ashtiani filed a Motion to Seize Cover-Up in
20 Postal Violation of EOC Director in Coordinated Effort of
21 Defendant's Counselors in Hawaii and Guam. That same date,
22 Ashtiani filed an Amended Motion to Seize Cover-Up in Postal
23 Violation of EOC Director in Coordinated Effort of
24 Defendant's Counselors in Hawaii and Guam. On April 16,
25 2003, Ashtiani filed a Pleading to Defendants' Counsel of
26 Proper Service to Unrepresented Party. On May 5, 2004,

1 Ashtiani filed a Pleading to Defendants' Counsel of Future
2 Communications in Reasonable Time and Good Faith.

3 However, toward the later stages, he appeared to be
4 aware of his legal rights and of the requirements of the
5 Federal Rules of Civil Procedure, and for the most part
6 demonstrated an understanding of the Rules and capability of
7 following them. He cited the proper standard for summary
8 judgment and for each party's burden of proof in his Motion
9 for Partial Summary Judgment. (Motion for Partial Summary
10 Judgment, p. 11-13) He successfully moved to compel
11 discovery from Defendants, and also to strike several of
12 Defendants' exhibits attached to their Motion for Summary
13 Judgment. (Orders filed 11/24/03 and 4/23/04.)

14 In the Court's August 30, 2004 Order granting
15 Defendants' Motion for Summary Judgment and denying
16 Plaintiff's Motion for Partial Summary Judgment, the Court
17 determined that the Plaintiff failed to establish a prima
18 facie case with regard to counts 2 (Negligent Supervision),
19 5 (Violation of the Family and Medical Leave Act), and 8
20 (Sales of Fraudulent Insurance Policy). (Order, p. 8, 16,
21 19.) The Court further determined that the facts presented
22 by the Plaintiff did not support the legal causes of action
23 with regard to counts 1 (Intentional Infliction of Emotional
24 Distress), 4 (Intentional Discrimination and Intentional
25 Retaliation Post-9/11), and 6 (Constructive Termination).
26 (Order, p. 6, 14, 17.) The Court determined that with

1 regard to Plaintiff's claim for Wrongful Termination, the
2 claim is to be denied if dealing with the FMLA, because the
3 FMLA would provide an adequate remedy. (Order, p. 17.)
4 Finally, the Court determined that with regard to
5 Plaintiff's claim for Unlawful Discrimination Based Upon
6 Race and National Origin, the Plaintiff failed to carry his
7 burden of demonstrating that Defendant's legitimate business
8 reason for terminating him was pretextual. (Order, p. 13.)

9 Defendant has now filed this Motion for Attorneys'
10 Fees. Plaintiff has not filed an Opposition. For the
11 following reasons, the Court **DENIES** Defendant's Motion for
12 Attorneys' Fees.

13 **III. ANALYSIS**

14 **A. Legal Standard: Attorneys' Fees**

15 Defendant has brought this Motion for Attorneys' Fees
16 pursuant to 42 U.S.C. §2000e-5(k) and Fed. R. Civ. P. 54(d),
17 which permit the Court, in its discretion, to award the
18 prevailing party reasonable attorney's fees. See also
19 Miller v. Los Angeles County Bd. of Education, 827 F.2d 617,
20 619 n.2 (9th Cir. 1987). "[A] district court may in its
21 discretion award attorney's fees to a prevailing defendant
22 in a Title VII case upon a finding that the plaintiff's
23 action was frivolous, unreasonable, or without foundation,
24 even though not brought in subjective bad faith."
25 Christiansburg Garment Co. v. Equal Employment Opportunity
26 Commission, 434 U.S. 412, 421 (1978). However, the mere

1 fact that a plaintiff did not prevail does not mean that his
2 action was unreasonable or without foundation. Id. at 421-
3 22.

4 The above standard is to be applied "with particular
5 strictness where the plaintiff proceeds pro se." Miller,
6 827 F.2d at 620. The Court may consider several relevant
7 factors when the plaintiff is proceeding pro se. First, the
8 Court may consider whether the district court dismissed the
9 case or held a full-blown trial. Id. Next, the Court may
10 consider whether the plaintiff recognized the merits of his
11 case. Id. However, it is relevant to making such
12 determination whether the plaintiff has made repeated
13 attempts to bring a claim previously found to be frivolous,
14 or whether the plaintiff brought the claims to federal court
15 in bad faith. Id. at 620-21. Finally, the Court may
16 consider the financial resources of the plaintiff. Id. at
17 621.

18 **B. Analysis: Attorneys' Fees**

19 **1. Dismissal of Case v. Full-Blown Trial**

20 The Court dismissed this case without a full-blown
21 trial. In its August 30, 2004, Order, the Court **GRANTED**
22 Defendants' Motion for Summary Judgment and **DENIED**
23 Plaintiff's Motion for Partial Summary Judgment. The Court
24 determined that all of Plaintiff's claims either: (1) failed
25 to establish a prima facie case; (2) the facts presented by
26 the Plaintiff did not support the legal causes of action;

1 (3) the claim was to be denied because the FMLA would
2 provide an adequate remedy; or (4) the Plaintiff failed to
3 carry his burden of demonstrating that Defendant's
4 legitimate business reason for terminating him was
5 pretextual. (Order, p. 6, 8, 13, 14, 16, 17, 19.)
6 Subsequently, Defendants' Motion for Summary Judgment was
7 **GRANTED** in its entirety and the case was dismissed by the
8 Court without a full-blown trial.

9 2. Recognition of Merits of the Case

10 With regards to the issue of Plaintiff's recognition of
11 the merits of the case, the EEOC previously informed
12 Plaintiff it could not find any discriminatory conduct or
13 animus on the part of the Defendant. Plaintiff first filed
14 a charge with the EEOC which the EEOC dismissed because it
15 was "unable to conclude that the information obtained
16 establishes violations of the statutes." (Ex. A.) Prior to
17 the issuance of this formal Dismissal and Notice of Rights,
18 the EEOC informed Plaintiff that "[t]he investigation did
19 not discover any evidence of racial animus against
20 [Plaintiff]," and specifically found Plaintiff had not
21 presented any evidence that he was discriminated against on
22 the basis of national origin. (Exs. B, C.) However, it is
23 unclear whether the EEOC found the Plaintiff's claims to be
24 frivolous or unreasonable. Such findings would provide
25 support for an award of attorney's fees.

1 Similarly, if there was evidence that the Plaintiff had
2 proceeded with his lawsuit in bad faith there would be
3 support for such an award. However, it appears that the
4 Plaintiff had an earnest and sincere belief that the
5 Defendants had discriminated against him. Yet, the case as
6 presented was not strong enough to stave off a summary
7 judgment motion.

8 However, a finding of summary judgment in the
9 Defendants' favor does not mean that the Plaintiff's claims
10 were entirely groundless. "Rule 56 is a tool to narrow the
11 factual and legal issues to be brought to trial, but does
12 not necessarily mean that a finding not in favor of a
13 plaintiff means that the plaintiff had no basis for filing a
14 complaint." Riddle v. Egensperger, 266 F.3d 542, 551 (6th
15 Cir. 2001); see also Miller, 827 F.2d at 620 ("[p]ro se
16 plaintiffs cannot simply be assumed to have the same ability
17 as a plaintiff represented by counsel to recognize the
18 objective merit (or lack of merit) of a claim."). If the
19 Plaintiff's underlying claims were so frivolous, Defendants
20 could have used Rule 12(b)(6) to narrow the claims at the
21 onset of the case, rather than engaging in discovery in
22 order to "obtain" summary judgment. Riddle, 266 F.3d 542,
23 551 (6th Cir. 2001). However, they chose not to file such a
24 motion and the fees continued to accrue. The Plaintiff
25 should not be held responsible for those climbing fees when
26 the Defendants, with the aid of counsel, could have done

1 something to perhaps decrease those fees.

2 **3. Financial Resources of the Plaintiff**

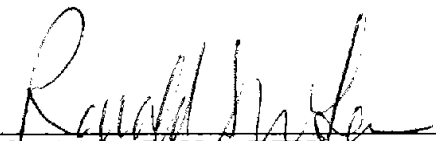
3 Awarding attorney's fees to the Defendants in this
4 matter would most likely be a severe financial hardship for
5 the Plaintiff. The final factor for the Court to consider
6 is whether the Plaintiff would be subjected to financial
7 ruin. Miller, 827 F.2d at 621. Here, the Defendant's fee
8 request is sizable. It seeks an award of Fifty Three-
9 Thousand One Hundred Ninety Five and 32/100 Dollars
10 (\$53,195.32). Plaintiff is self-employed as an automobile
11 mechanic and provides on-call auto repair services 24 hours
12 a day. (Ex. I.) However, it should be noted that the
13 Plaintiff's actual income from such activity is unknown. It
14 is most likely he does not earn enough to meet his family's
15 needs as he made an early withdrawal of his 401-K retirement
16 (\$46,000.00) resulting in an assessment of penalties. Id.

17 Based on such proffered evidence and balancing the
18 competing interests, the Court **DENIES** Defendants' request
19 for attorney's fees, because it cannot be said that the
20 Plaintiff's claims were frivolous, unreasonable, or without
21 foundation, or brought in bad faith. Christiansburg Garment
22 Co. v. Equal Employment Opportunity Commission, 434 U.S.
23 412, 421 (1978). The Plaintiff has had his day in Court and
24 has accepted the Court's decision. He has not appealed this
25 decision.

1 Therefore, the Court finds that it should not assess
2 penalties against Plaintiff, because in hindsight he should
3 have appreciated that the continued litigation would have
4 proven unsuccessful. "To assess attorney's fees against
5 plaintiffs simply because they do not finally prevail would
6 substantially add to the risks inhering in most litigation
7 and would undercut the efforts of Congress to promote the
8 vigorous enforcement of the provisions of Title VII."
9 Christiansburg Garment Co., 434 U.S. 412, 421-22 (1978);
10 Riddle v. Egensperger, 266 F.3d 542, 551 (6th Cir. 2001) ("An
11 award of attorney fees against a losing plaintiff in a civil
12 rights action 'is an extreme sanction, and must be limited
13 to truly egregious cases of misconduct.'"). (citation
14 omitted). Accordingly, the Court **DENIES** Defendants' Motion
15 for Attorneys' Fees.

16
17 **IT IS SO ORDERED.**

18
19
20
21 DATED: December 2, 2004



RONALD S.W. LEW
Designated District Judge

Notice is hereby given that this document was
entered on the docket on 12/27/04.
No separate notice of entry on the docket will
be issued by this Court.

Mary L. M. Moran
Clerk, District Court of Guam

By  12/27/04
Clerk Date

22
23
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25
26 ³ The Honorable Ronald S.W. Lew, United States District Judge
for the Central District of California, sitting by designation.